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No. 300

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In The Supreme Court of the United States

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Petitioner,

vs.

J. A. CZIZEK,
Respondent.

REPLY BRIEF
on behalf of
THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner.

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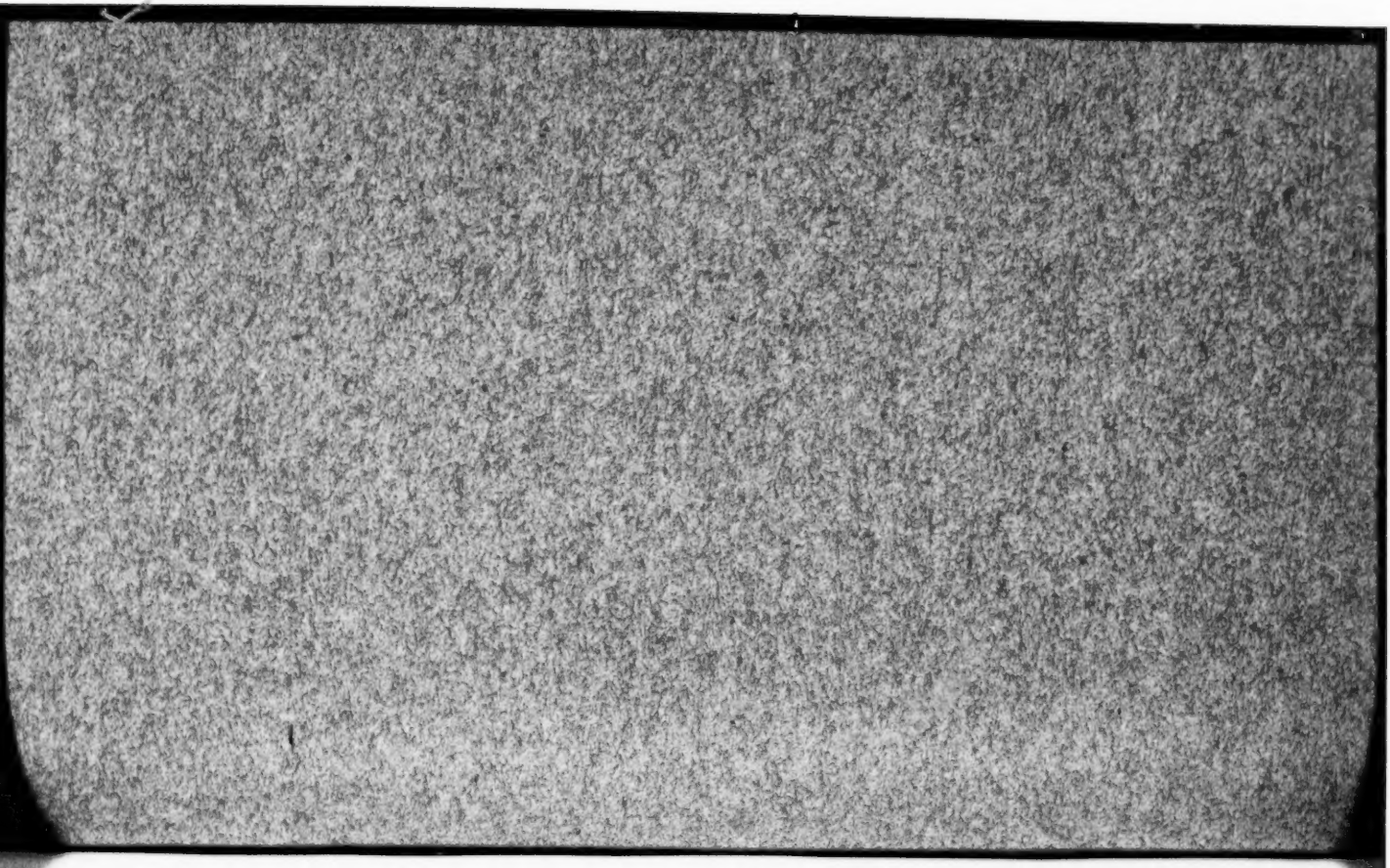

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I.

The Unrepeated Message Clause.

Respondent's argument that the limitations of liability provided for by the language that "the company shall not be liable for *mistakes or delays in the transmission or delivery, or for non-delivery*" beyond a certain sum, and that the company "shall not be liable for damages * * * for any mistakes or delays in the *transmission or delivery, or for the non-delivery*" of a telegram

beyond a certain other sum, do not include a *failure of transmission*, is without merit. These limitations were designed to, and do, cover every conceivable default which can occur in connection with the transmission of a telegram. In this case the allegation of the complaint is not that the message was never transmitted from the office at Boise, Idaho, but that it was "never transmitted by defendant *to plaintiff*, and was consequently *never received by plaintiff*" (Tr., p. 10). The fact of ultimate importance, out of which the liability, if any, springs, is not the failure to send the message to or beyond this or that particular point, but the failure to place it promptly and correctly in the hands of the addressee—i.e., the non-delivery. The sender is interested only in the correct transmission and delivery of his telegram, as is likewise the addressee. If the message is not delivered to the addressee in correct form as filed by the sender, what conceivable difference can it make to either of them where the failure of duty occurred? If a message is filed with a telegraph company at New York addressed to San Francisco, and the telegraph company fails to deliver it as addressed because the message was inadvertently sent to San Antonio, or because the message was inadvertently placed with sent messages in the New York office, or because the message was inadvertently placed with the delivered messages in the San Francisco office, what affects the sender and the addressee is the fact that the addressee did not receive the message and not its particular cause.

As was said by the supreme court of Indiana in *Western Union v. Braxtan*, 165 Ind. 163; 71 N. E. 985, in holding that a statute which provided a penalty for failure of a telegraph company to "transmit" messages with impartiality and in good faith, and in the order of time in which they were received, applied to a failure to *deliver* a message after its arrival at the terminal office:

> "It is incomprehensible how a telegraph company may receive and transmit a message from one to another without a delivery."

The converse of this must also be true. Since there can be no delivery without transmission, non-transmission must be included in the term "non-delivery."

On page 22 of respondent's brief, reference is made to 37 Cyc. 1686, and to the case of *Beatty Lumber Company v. W. U.*, 52 W. Va. 410; 44 S. E. 309. But this reference to Cyc is to the section dealing with the modification of the liability of telegraph companies BY CONTRACT. That subject has nothing to do with the point under consideration. It is well known that in a number of jurisdictions the stipulations, considered as contract provisions, are regarded as altogether invalid. Before the Act of 1910 the *Primrose case* (154 U. S. 1), was not, even as to interstate messages, binding on State courts. Some State courts refused to follow it at all, even as to errors; while others, recognizing the right of the company to limit its liability for errors and other acts of "simple" negligence, held

that a limitation of liability for "gross" negligence was contrary to public policy, and a few, in the application of that rule, have treated the failure to send a message from the point of origin, when unexplained, as prima facie evidence, at least, of "grossness."

Thus in the *Beatty Lumber* case, decided in 1903, which may be taken as typical of the cases cited by respondent, it was said, with reference to the unrepeated message condition:

> "Whether such a condition is valid has been the prolific source of elaborate and able discussion in England and almost every one of the American states, and in the Federal courts, and there is vast conflict of opinion between the courts upon the subject; many courts holding such a condition utterly void to exempt the company from liability, and others holding it valid, or partly valid. It is a well-established rule that a common carrier cannot make any contract or stipulation with one dealing with it by which it can screen itself from liability for loss arising from its negligence. * * * It is because of that doctrine that so many courts stamp the above condition as void, but it must be said that the preponderance of authority holds such condition valid, certainly to the extent of excusing the company from loss for want of ordinary care. * * * The subject is ably discussed in *Primrose v. Western Union Telegraph Company*, 154 U. S. 1. * * *
>
> "As to that clause excusing total failure to deliver, it can be said that even those courts which hold such a condition good as to mere error in transmission recognize that it is not good to forgive a total failure to deliver or to transmit."

It will thus be seen that in this case the court was considering not what the parties intended by the stipulation, but how far public policy would permit that intention to be given effect. The validity of the stipulation since the Act of 1910 as against "gross" negligence has already been dealt with in our principal brief. But it is significant, and attention is particularly invited to the fact, that in the Beatty Lumber Company case (which incidentally holds that there can be no proximate damage as the result of the non-delivery of a message such as this, containing a mere offer), the court made no distinction between a failure to transmit a message and a failure to deliver it.

This case, as well as the cases of *Pierce Company v. W. U.* and *Weld v. Postal*, cited on page 29 of respondent's brief, and the cases of *Wenger* and *Wann* cited on page 30, were decided long before the Act of 1910.

The case of *Freschen v. W. U.*, 189 N. Y. Supp. 649, cited on pages 30 and 31 of respondent's brief, was decided before the decision of this court in the *Estere* case, and it may not be improper to mention that after the Esteve decision was brought to the attention of counsel for plaintiff in the *Freschen* case, the judgment in that case was reversed by stipulation of counsel.

The Valuation Clause.

We will not undertake to re-argue the validity of the fifty-dollar valuation clause, because it has been approved by the Commission and by this court. If the sender of a message cannot contemplate within reasonable limits the extent of the damage which is likely to result from its non-delivery, neither can the telegraph company; and there is no reason why the telegraph company should be liable for a consequence which it could not contemplate. Indeed, it would not be even in the absence of conditions. *Hadley v. Baxendale*, 9 Exch. 345; *Primrose v. Western Union*, 154 U. S. 1. That the fifty-dollar valuation clause is not affected by the degree of the negligence, if negligence has degrees, has been shown in the principal brief.

In this connection it may not be amiss to quote from the answer in the original Unrepeated Message Case.

"No Reason Why a Message cannot be Valued.

> "The respondent submits that there is no merit in the suggestion that a message in its nature is not susceptible of valuation. If the sender of a message, who contracts with a telegraph company that it shall be transmitted, is unable to form any intelligent estimate of the money value, to himself or the addressee (whichever is the legal party in interest), of a proper performance of the telegraph company's promise, then it is certatinly not unfair that the telegraph com-

pany's liability for failure to perform its promise should be limited to a specified sum beyond which the sender cannot say that he or the addressee will be damaged by non-performance. Since the telegraph company should not be liable in any event except for such consequences as it could reasonably have contemplated, there is nothing unreasonable about insisting that the sender also shall be held to the duty to contemplate the possible results of non-performance, and shall express his conclusion in dollars and cents before, instead of after, the happening of a default, or in the alternative that he should be held to some reasonable limit of recovery; and the respondent again avers that the limitation of fifty dollars is a reasonable limit, and far in excess of the money loss which is likely to result from any possible default in connection with the handling of the average message, or with the handling of more than seventy-five per cent. of all telegraph messages. If the case is one in which the value can be reasonably calculated in advance, it is not unfair to require the sender to calculate it; if the case is one in which the value cannot be reasonably calculated in advance, it is not unfair to say that the respondent shall not be liable for what it could not have foreseen beyond an amount far in excess of the possible damage in connection with the ordinary message."

Respondent refers to the case of *Leedy v. W. U. T. Co.*, 130 Tenn. 547; 172 S. W. 278. In so far as that case cast any doubt on the validity of the fifty-dollar valuation clause, it must be considered as overruled by *W. U. T. Co. vs. Schade*, 137 Tenn. 214; 192 S. W. 924 (1917), in which the court said:

> "It is now generally held, as the court of civil appeals states, that by this amendatory act Congress has occupied the field with respect to interstate telegrams. The result is to make applicable the rulings of the Federal courts in reference to the validity of contractual limitations, such as that of a $50 liability for such failure in relation to messages sent from one state to another. The question was raised by counsel and stated in the opinion in *Leedy v. Western Union Tel. Co.*, 130 Tenn. 547, 550; 172 S. W. 278, but a decision of the point was found not necessary in that case."

Effect of the Second Decision of the Interstate Commerce Commission in the Unrepeated Message Case.

It is argued that because in the reopened Unrepeated Message Case, reported in 61 I. C. C. 541, the limitations of liability theretofore in effect were held to be unreasonable as to amount, such holding was retroactive, and that therefore the conditions had always been unreasonable. Such is not the effect of that decision. In the first opinion in that case (May 17, 1917, 44 I. C. C. 670), the Commission said:

> "It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of message with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the

act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. * * *

"Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully atttached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary *are binding upon all until lawfully changed;* and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

It will be noted that the decision just referred to was handed down by the Commission on May 17, 1917, and that the message on which this

action was based was filed with the telegraph company on November 30, 1917.

Furthermore, in its opinion in the reopened case (May 3, 1921, 61 I. C. C. 541) the Commission said:

> "The Unrepeated Message Case was decided May 17, 1917. By it common carriers engaged in the transmission of messages were apprised as to what, in our opinion, their practices should be in the settlement of damage claims arising through defaults in service. In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing."

The report of the Commission concluded with the following:

> "Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of unrepeated and repeated interstate messages *are and for the future will be unreasonable;* * * *."

The order of the Commission issued May 3, 1921, directed that:

> *"That said respondents be, and they are hereby, notified and required to cease and desist, on or before July 13, 1921, and thereafter* to abstain, from maintaining or applying the present rules and provisions limit-

ing respondents' liability for errors or delays in the transmission or delivery, or for non-delivery, of interstate messages by telegraph."

During the interval between May 3, 1921, the date of the order, and the date when that order became effective, July 13, 1921, it is manifest that the Commission intended that the then existing limitations, which had been approved in the decision of May 17, 1917, should continue in effect. The Commission's own view of the effect of its order, namely, that it was not retroactive, has several times been expressed in letters to claimants, typical examples of which are attached as Exhibit A.

Manifestly these considerations distinguish the present from the case of *Pennsylvania R. R. Co. v. Stineman Coal Company*, 242 U. S. 299.

It may be said in passing that respondent's counsel is in error in assuming that the plaintiffs in the *Cultra* case (the action at law for damages in Missouri) were allowed a recovery. As a matter of fact that case was dismissed on December 12, 1917.

The Sixty Day Clause.

This condition is intended to and does impose on the claimant the duty of ascertaining whether he has a claim within sixty days from the time the message was sent, and giving written notice of it if he has. It does not, nor was it intended to, prescribe a period, long or short, within which

he shall present a claim after he has in fact discovered the failure of his message. Such as it is, it has been repeatedly sustained by the courts, including the decision of the Circuit Court of Appeals in the *Gardner* case, referred to in our principal brief, in which this court refused certiorari. That it cannot be waived has been abundantly shown by the authorities cited in our principal brief. See also *Kerns v. Western Union Telegraph Company* (Missouri), 198 S. W. 1132 (not officially reported), and *Postal v. Howe* (Nevada), 211 Pac. 358 (not officially reported).

The Law of the Case.

The petitioner could not have applied to this court for certiorari after the decision of the Circuit Court of Appeals on the first appeal, because, the case having been remanded to the District Court for further proceedings, that decision of the Circuit Court of Appeals was not final. It is unnecessary to refer to the recent case of *Georgia Ry. Co. v. Decatur*, 262 U. S., 432, 437, in which it was said:

> "We are not unmindful of the ruling of the Appellate Court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western*

Telegraph Co. v. Burnham, 162 U. S. 339, 343; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214; *Zechendorf v. Steinfeld*, 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this Court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases cited."

The following is quoted from *United States v. Denver & Rio Grande R. R.*, 191 U. S. 84, 93:

> "While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

Other cases in point are *Coe v. Armour Ferti-*

lizer Works, 237 U. S. 413, 418, and *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251.

Respectfully submitted,

FRANCIS R. STARK,
195 Broadway, New York.
BEVERLY L. HODGHEAD,
14 Montgomery Street,
San Francisco.
JOSEPH L. EGAN,
195 Broadway, New York.
J. JULIEN SOUTHERLAND,
195 Broadway, New York.
Counsel for Petitioner

Exhibit A.

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington

George B. McGinty,
Secretary.

765736

January 16, 1922.

J. C. Mayer & Co.,
318 Walnut Street,
Cincinnati, Ohio.

Gentlemen:

This will acknowledge receipt of your letter of January 6, attacking the Commission's ruling regarding the limitation of the liability of the telegraph companies in connection with the transmission of telegraph messages.

It may be well to state at the beginning that although this Commission under the Interstate Commerce Act has jurisdiction over the rates charged for, as well as the rules and regulations in connection with, messages forwarded interstate by telegraph or telephone companies, it does not exercise jurisdiction to determine the merits of loss and damage claims such as those alluded to by you, your remedy being by suit in a court of competent jurisdiction.

Doubtless the case to which you refer is the Unrepeated Message Case, The Clay County Produce Company v. The Western Union Telegraph Co., 61 I. C. C. 541. For your information there is enclosed a copy of the decision therein. You will observe that the Commission ruled that the maximum liability in the case of a message for the transmission of which the unrepeated rate is charged should not be less than $500. **The rea-**

sonable rules as prescribed by the Commission were ordered to take effect on July 13, 1921, and should not be considered as applying retroactively. Apparently therefore the Western Union was correct in refusing to make refund in excess of the amount received for sending the message in May, 1921.

It is believed that a careful reading of the enclosed report will demonstrate to you that your complaint was filed under a misapprehension of the Commission's rulings on the subject and that the telegraph companies may not now attempt to exempt themselves from liability, beyond the toll received, for the improper handling of unrepeated messages.

Respectfully,
G. B. McGINTY,
Secretary

Enc.

INTERSTATE COMMERCE COMMISSION
Washington
File No. 750577

December 13, 1921.

Mr. C. A. Herman, Traffic Dept.
Cudahy Brothers Company,
Cudahy, Wisconsin.

Dear Sir:

This will acknowledge receipt of your letter of November 28th, relative to your claim No. 20361, against the Western Union Telegraph Company for damages alleged to have been suffered through delay in the transmission of a telegraph message June, 1921.

For your information, it may be stated that while this Commission has jurisdiction to determine whether or not the charges of the telegraph companies are just and reasonable, it does not

exercise jurisdiction to pass upon the merits of loss and damage claims such as you mention, your remedy, if any, being by suit in a court of competent jurisdiction along the usual lines of procedure.

In compliance with your request, there is enclosed a copy of the Commission's decision in the Unrepeated Message Case, the Clay County Produce Company v. Western Union Telegraph Company, 61 I. C. C. 541, relative to the limitations of liability in connection with the transmission of telegraph messages. **The reasonable rules prescribed by the Commission were ordered to take effect on July 13, 1921, and should not be considered as applying retroactively.** The fact that the Commission's decision was rendered prior to the transmission of the message in question is not believed to be controlling, insofar as the retroactive effect of that decision is concerned.

Respectfully,

G. B. McGINTY,
Secretary